

**STATE OF NEW JERSEY
DEPT. OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL08WB-67103-E**

Lisa Flythe,)	
)	
Complainant,)	
)	
v.)	Administrative Action
)	FINDING OF PROBABLE CAUSE
)	
Blue Moon Acres,)	
)	
Respondent.)	

On September 4, 2018, Lisa Flythe (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that Blue Moon Acres (Respondent) discriminated against her based on age and race, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. DCR's investigation found as follows.

SUMMARY OF INVESTIGATION

Respondent is a family-owned and operated farm located in Pennington, New Jersey. Respondent sells organic produce on a wholesale and retail basis to phone, internet and walk-in customers. On May 15, 2017, Respondent hired Complainant as a Customer Service Representative (CSR). In this position, she was responsible for facilitating orders for the purchase of Respondent's products and maintaining high quality communication amongst customer service team members and the production team. CSRs are also responsible for additional duties and tasks as assigned to support the goal of customer service and sales. On July 10, 2018, Complainant was discharged.

In the verified complaint, Complainant alleged that she was discriminated against based on her age (55 years old) and race (Black). Specifically, Complainant alleged that she was discharged for unacceptable behavior and for leaving work early, whereas non-Black employees who engaged in similar conduct were not discharged. According to Complainant, she was accused of yelling at a co-worker on July 9, 2018, hanging up the phone on her supervisor during a call the following day (July 10) to discuss the situation, and then leaving work early immediately after that phone call without waiting for explicit supervisor authorization to leave. Complainant stated that a similarly situated, 29-year old, non-Black employee, [REDACTED], likewise engaged in unacceptable behavior by distributing false information about a customer's account, but was not terminated. Complainant further alleged that she had properly sent an e-mail to her supervisor on July 10th, advising her that she needed to leave work early because she felt ill and that similarly situated, non-Black, younger employees left work early after providing email notice and without waiting for supervisor authorization because they were not feeling well, yet their employment was not terminated.

In its response to the complaint, Respondent denied that age and race played any part in its decision, and asserted that Complainant was discharged for leaving work without permission and without ensuring coverage for her duties as required by company policy. Respondent's answer stated on page 5 that: "Only sale/customer service team employees are permitted to call off sick via email. All other employees of Blue Moon Acres are required to call or text their manager for sick leave." No policy was submitted to support Respondent's claim that a customer service team employee is required to obtain a manager's prior approval or arrange work coverage before leaving the premises if she is sick.

In an interview with DCR, Complainant said [REDACTED] hired her on May 15, 2017. As a CSR, her work hours were 7:45 a.m. to 4:30 p.m. Complainant explained that Respondent employed two full time customer service representatives and one part-time customer service representative. The supervisor for all employees was Ashley Lyons-Putman, daughter of the farm's owners.

DCR asked Complainant to explain in detail what took place from July 9, 2018, up until her discharge on July 10, 2018.

Complainant stated that on July 9, 2018, she and Retail Sales Representative, [REDACTED], worked on-site as they usually did. According to Complainant, during the day they spoke to each other through the walls when they communicated, as they typically did. Complainant explained that sale days are Monday and Thursday on the farm. There are requirements for drafting a newsletter for clients and the CSRs have until noon each day to make sales. Complainant said the mornings are especially busy and "crazy."

Complainant stated that on that particular day she was having a "bad" day. Complainant explained that [REDACTED] "messed up with a customer's invoice" and [REDACTED] asked Complainant to change the invoice. [REDACTED] also sent a mass email blaming Complainant for the error. Complainant said she looked at the invoice and noticed it was an invoice for Lyons-Putman's customer, not Complainant's customer, and thus was not her error. Complainant stated she got angry and asked [REDACTED] whether she had checked her work for accuracy. Complainant denied calling [REDACTED] incompetent and said she only told [REDACTED] to do her "due diligence" before she sent a mass e-mail about an incorrect invoice. Complainant said if she was yelling it would have been normal behavior because they always yelled through the walls: "[t]hat is typical practice." During the interview, DCR asked if Complainant could recall any witnesses during the yelling incident between her and [REDACTED] and Complainant said there were no witnesses present.

Complainant told DCR that when she was working on July 10th she received a telephone call from Lyons-Putman. Lyons-Putman informed Complainant that she had received a complaint from [REDACTED] stating that Complainant had yelled at her and called her incompetent. Lyons-Putman told Complainant that she created an unsafe environment at Blue Moon Acres and Respondent would not tolerate this type of behavior. Complainant said when Lyons-Putman told her she created an unsafe environment she became very emotional and started sobbing on the phone. Complainant explained that she said: "I can't talk right now, I have to call you back, I'm sorry, I will call you back later," and then hung up the phone. Complainant said that at no time did

she purposely or impolitely hang up the phone. Complainant explained that she was extremely emotional because Lyons-Putman was telling her she created an unsafe environment and her feelings were hurt because the statement was not true.

Complainant stated that after the telephone call she felt sick, so she e-mailed Lyons-Putman notifying her that she would be leaving early because she did not feel well. Complainant said that a few moments after she left, she received a text message from Lyons-Putman. Complainant provided a print out of the text message to DCR for review. The message is dated July 10, 2018, at 12:02 p.m and says: "Lisa[,] your behavior today was inappropriate and you left the farm without receiving permission. Today was your last day at Blue Moon. Do not return." A few minutes after receiving the first message, Complainant received a second text message that said, "If you need us to send you any items from your desk or elsewhere, you can list those items here."

Complainant also stated that once a person was employed by Respondent for a full year, he or she received sick and vacation time.

During the interview, DCR asked Complainant if Respondent had a procedure to follow if an employee needed to leave work early. Complainant told DCR an employee was supposed to let someone know, either a senior employee or management.

DCR asked Complainant if she was required to arrange work coverage when she left early on July 10, 2018. Complainant said that there was no requirement for finding such coverage, but that she was required to notify someone if she was leaving early. Complainant stated that she complied with this requirement by sending her supervisor an email prior to leaving the premises. Complainant stated that she felt sick and could not have waited for a response or to be cleared to leave on July 10th.

Complainant also said that there were times that [REDACTED] (age 29) and [REDACTED] (age 37), both members of Respondent's customer service team and both younger white women, did not call or text a manager when taking sick time, and they were never fired.

DCR interviewed [REDACTED]. [REDACTED] said she worked on the farm from August 2017 until September 2018. [REDACTED] told DCR she quit working for Respondent because she was sexually harassed by a coworker.¹ DCR asked [REDACTED] if she was aware of any employees who left work early or otherwise called out as sick without receiving approval from their manager first. [REDACTED] said she could recall one incident where [REDACTED] and [REDACTED] were dating and planned a trip. [REDACTED] recalled that on the Monday following their trip, a work meeting was held and neither of them appeared for the meeting. Neither [REDACTED] nor [REDACTED] had received approval for taking off and both were considered a no call-no show. [REDACTED] said Respondent's owner, Kathy Lyons, called [REDACTED] on the phone that same day and fired him over the telephone. [REDACTED] said they (the owners) did not do anything to [REDACTED], and they instead later promoted her to an assistant retail manager position.

¹ [REDACTED] allegations would fall outside the DCR's statute of limitations of six months and were thus not considered by DCR as a separate claim.

DCR also interviewed [REDACTED]. [REDACTED] told DCR that he could not recall an actual policy for leaving work early. [REDACTED] described Lyons-Putman as “pretty micro managery; she runs the ship.” [REDACTED] was asked if he was aware of a procedure or practice for leaving work early. He said there was no unlimited or unaccountable time one could take, but employees were expected to communicate with their managers for taking time off or leaving work early.

Lyons-Putman said she received an email right after the telephone call that Complainant was leaving early. Lyons-Putman said the email did not say she was leaving early because she was sick. During the interview, DCR asked Lyons-Putman if Respondent followed a handbook or company policy regarding employees who took time off and, if so, what the procedures were. Lyons-Putman explained to DCR that Respondent had a handbook and employees were to follow the company procedure set forth in the handbook. Lyons-Putman said that under the handbook, the employee is required to speak with a manager before leaving work early and, after checking with a manager, the employee is usually allowed to leave the premises. However, the employee needs to arrange for someone to cover his/her work and figure out what work is left prior to leaving the premises.

Lyons-Putman provided DCR with a single, undated sheet purporting to be the entire contents of Respondent's "handbook." It stated, in relevant part:

4

Discipline: *Warnings given for a drug or alcohol use, theft, excessive lateness, harassment of any type, discrimination, or any other issue considered by a problem by a manager. Three warnings result in termination.*

However, in response to DCR's Request for Information, which asked for the identity of any employee allowed to "call out" sick by way of written email notice to a supervisor and requested a copy of that policy, Respondent wrote: "[o]nly sales/customer service team employees are permitted to call off sick via email. All other employees of [Respondent] are required to call or text their manager for sick leave." Respondent identified Complainant as a "Customer Service Representative" and [REDACTED] as a "Field Sale Representative."

Lyons-Putman also confirmed that employees received sick and vacation time after being employed with the company for 1 year.

DCR requested and received all records relating to Complainant's Sick and Vacation time. Those records showed that as of July 16, 2018, Complainant had an available balance of 24 hours of sick time and had used zero sick hours as of that date. It also showed that Complainant had an additional 40 hours available for vacation time and had used zero vacation hours as of that date.

Lyons-Putman was asked if [REDACTED] ever left early or did not call to say that she was not going to be at work. Lyons-Putman said she could recall one time that [REDACTED] requested to leave early for a doctor's appointment. Lyons-Putman said [REDACTED] asked via e-mail, and Lyons-Putman approved her request and allowed [REDACTED] to leave early. Lyons-Putman said there have been other times that she has verbally allowed people to leave early.

Lyons-Putman confirmed that Respondent did not provide any disciplinary written warnings to Complainant at any time during of her employment.

In response to the evidence presented by Respondent regarding the one-page "handbook" and her available sick hours, Complainant told DCR that the one-page "handbook" that was provided to DCR by Respondent was not the same "handbook" which was used when she was hired to work for Respondent. In addition, Complainant said she had never signed a receipt for any policy/handbook for Respondent while employed.

Complainant also said that she was able to use her sick time because she was given sick/vacation time after her first year employed by Respondent. Complainant also provided DCR with copies of text messages between her and Lyons-Putman to support her statement that other employees did not always notify Lyons-Putman about calling out sick and yet remained employed. DCR reviewed the text messages, one of which showed that Lyons-Putman directed a text message to Complainant about one such instance. The text message read, "Lisa[,] [REDACTED] did not reach out to me to let me know she was sick today which is fine but it leads me to believe she may be reaching out to you if she can't come in on Monday. If that is the case, could you please send word to [REDACTED] as soon as you hear from [REDACTED]?"

ANALYSIS

At the conclusion of an investigation, the DCR Director is required to determine whether “probable cause exists to credit the allegations of the verified complaint.” N.J.A.C. 13:4-10.2(a). “Probable cause” for purposes of this analysis means a “reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated.” N.J.A.C. 13:4-10.2(b). If DCR determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if DCR finds there is no probable cause, then that determination is deemed to be a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

A finding of probable cause is not an adjudication on the merits. Instead, it is merely an initial “culling-out process” in which the Director makes a threshold determination of “whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits.” Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev’d on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the “quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits.” Ibid.

The LAD makes it unlawful to discriminate against an employee in the “terms, conditions or privileges of employment” based on age or race. N.J.S.A. 10:5-12(a).

Complainant, a one-year employee of Respondent’s farm, alleges that she suffered age and race discrimination when she was terminated from her position as a Customer Service Representative in July 2018 for taking unauthorized sick leave and for what Respondent described to Complainant as “unacceptable behavior.” Respondent identified only the unauthorized sick leave as the basis for Complainant’s discharge.

To present a prima facie case based on discriminatory discipline or discharge, the employee must show: (1) that he or she was a member of a protected group; (2) that there was a company policy or practice concerning the activity for which he or she was disciplined; (3) that a person outside the protected class either was given the benefit of a lenient company practice or was not held to compliance with a strict company policy; and (4) that he or she was disciplined either without application of a lenient policy, or in conformity with the strict one. Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 305 (App. Div. 2000) (citing Jackson v. Georgia Pacific Corp., 296 N.J. Super. 1, 21 (App. Div. 1996), certif. denied, 149 N.J. 141 (1997)). Thus, a disparate treatment claim with regard to discipline “requires comparison between the [employer’s] conduct toward [the employee] and other members of the protected class on one hand, and similarly situated employees not within the protected class on the other.” Jason, 329 N.J. Super. at 305. Such a claim is demonstrated when a member of a protected class is singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion. Mandel v. USB/Painewebber, Inc., 373 N.J. Super. 55, 74 (App. Div. 2000).

Here, the investigation found sufficient evidence to support a reasonable suspicion that that Complainant, who is Black and who was age 55 at the time of the complaint, was subjected to discharge based on her age and race. Respondent asserted that Complainant was discharged

because she failed to obtain prior authorization before leaving her desk. But Complainant identified younger, non-Black comparators who were allowed to take sick leave without waiting for prior authorization from a supervisor and were not discharged for doing so: [REDACTED] and [REDACTED]. In addition, although Lyons-Putman maintained that she fired Complainant for leaving her post without prior authorization, Complainant provided DCR with a text message in which Lyons-Putnam wrote: “Lisa[,] [REDACTED] did not reach out to me to let me know she was sick today which is fine.” This text message thus indicated that Respondent did not always take action against people who used sick time without prior authorization or even always consider such behavior problematic.

In addition, Respondent’s response to DCR’s Request for Information No. 10 stated that Sales and Customer Service Representatives were permitted to provide email notice to a supervisor of sick leave, and said nothing about the alleged need for a Customer Service team employee to receive supervisor authorization before leaving work early due to illness or to arrange work coverage prior to leaving. Although this policy is inconsistent with the one page “handbook,” respondent provided, Complainant’s co-workers corroborated Complainant’s claim in this regard.

Although Respondent denies any discrimination, its conduct belies its own policies and practices. Respondent offered no reason why Complainant was discharged for allegedly abandoning her job by using sick leave to leave work early on one occasion, when other non-Black, younger employees holding similar customer service positions were not discharged for the same or similar behavior. Respondent failed to identify any other similarly discharged employee to support its position. Finally, Respondent failed to articulate any reason why it failed to follow its own progressive disciplinary policy as detailed by its former manager in Complainant’s case.

At this threshold stage in the process, there is sufficient basis to warrant “proceed[ing] to the next step on the road to an adjudication on the merits.” Frank, 228 N.J. Super. at 56. Therefore, the Director finds probable cause to support Complainant’s allegations of age and race discrimination.



Rachel Wainer Apter, Director
NJ Division on Civil Rights

Date: September 11, 2019